United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1252

TO BE ARGUED BY:
JAY GREGORY HORLICK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSEPH DE SIMONE,

Defendant-Appellant.

- x

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPELLANT DE SIMONE'S BRIEF

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QUESTIONS PRESENTED

1. Did the Court improperly limit cross examination as to promises made to the government's key witnesses?

2. Did the Court permit inflammatory and prejudicial statements from Mr. Joseph Esposito and improperly deny a motion for a mistrial?

3. Is the indictment jurisdictional defective because the special attorney was specifically designated to try this case pursuant to 28 U.S.C. 515a?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- JOSEPH DE SIMONE, Defendant-Appellant.	DOCKET NO.

PRELIMINARY STATEMENT

Joseph DeSimone, the appellant herein appeals from judgment of conviction entered on May 30, 1975 sentencing him to a maximum term of imprisonment of seven years, after a Jury trial (Bramwell, J.) rending a verdict of guilty of conspiracy to distribute a controlled substance, possession and distribution of a contro-led substance and conspiracy to extort in a credit transaction.

On a fourth count of the indictment charging extortion, the jury was uanble to reach a verdict.

Appellant was sentenced to a period of incarceration of seven years.

Appellant is at liberty on bail pending the outcome of this appeal.

STATEMENT OF FACTS

The defendant was indicted with one Louis Tonani and charged with violation of Title 18 U.S.C. Section 894 and Title 21 U.S.C. Section 846 and 841 al. The dase was tried before Judge Henry Bramwell. The United St ates was represented by James Dougherty, a Special Attorney in the Organized Crime Task Force office. A pretrial motion was made to test the authority of the Special Attorney and the motion was denied.

At the trial the Government called as its principal witness one Steven Varga. Mr. Varga testified in substance that during February, 1974 the defendant, JOSEPH DESIMONE conspired with Mr. Varga and Juanita Veldex to possess and distribute a quantity of cocaine. Although Mr. DiSimone and Mr. Vargas had never had any prior transaction involving any type of narcotics, Mr. DeSimone delivered approximately five ounces of cocaine and Mr. Varga agreed to pay approximately $5,800.00. The entire narcotics transaction was on credit and Mr Varga alleged that various meetings and conversations took place in which he was threatened. Juanita Veldex testified to the narcotics transaction although she contradicted much of what Mr. Varga has said. Agents of the F.B.I. were called and various tapes of conversations between Mr. Varga and the defendants were played. The Court prevented defense counsel from cross-examining Mr. Varga to show the extent of promises made to him with respect to his not being prosecuted for crimes he committed. The Government also called Joseph Esposito whose testimony was extended to corroborate events which took place in June, 1974. On that date Mr. Varga testified that the defendant, Tonani and three other men held him captive and drove him around various parts of Brooklyn. Mr. Esposito testified that he was the manager of an Earl Schribe paint shop and during June

he saw Mr. Tonani in possession of a weapon in his shop. The car driven by Mr. Tonani contained an individual that he barely saw and could not identify. His testimony was prejudicial and inflammmatory. The defendants did not testiry and the jury after deliberating for a period of approximately two days returned guilty verdits as to Mr. DeSimone as to the first three counts of the indictment and could not reach a verdict on the fourth count.

POINT ONE

THE TRIAL COURT COMMITTED REVERSABLE ERROR BY LIMITING CROSS-EXAMINATION OF THE GOVERNMENT'S KEY WITNESSES.

Steven Varga was the key witness against Joseph DeSimone. His testimony relating to a narcotic transaction was not bolstered by any physical evidence, and that transaction was the basis of the extortionate credit transaction.

The credibility of this witness was crucial in determining the guilt or innocence of the defendant. On cross-examination defense counsel attempted to bring out promises that were made to the witness with regard to immunity or lack of prosecution. The trial court limited counsel in such a way as to effectively preclude examination.

The witness had described his participation in various crimes including: conspiracies to possess and distribute cocaine; distribution of cocaine; and aiding and abetting in narcotic transactions. The testimony of Steven Varga also indicated usurious loans made by him but counsel could not question him with regard to prosecutorial promises beyond his participation in the case on trial.

The extent of the promises made to this witness had a direct bearing on his bias or incentive to create evidence. Counsel should have been given great latitude in cross-examining on this point.

In Gordon v. United States 344 US 414 the Court reversed a conviction where the trial court refused to allow evidence which would have shown a reason for or a motive for the witness' testimony. The Court held at page 422:

> "Although Marshall admitted pleading guilty to the offense and that nine months later he was still unsentenced, he denied that he had received either promises or threats. The transcript would have shown the jury that a

> federal judge, who still retained power to fix his sentence, in discussing Marshall's expectation of a "recommendation for a lenient sentence or for probation" had urged him to tell all he knew, "even though it might involve others." Involvement of others, whom Marshall had not theretofore mentioned, soon gollowed. We think the jury should have heard this warning of the judge, which was an addition to the matter brought out on cross-examination. The question for them is not what the judge intended by the admonition, nor how we, or even they, construe its meaning. We imply no criticism of it, and he expressly stawed that he was holding out no promise. But the question for the jury is what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker. They might have regarded it as an incentive to involve others, and to supply a motive for Marshall's testimony other than a duty to recount the facts as best he could remember them."

The Court has had more recent occasions to deal with the latitude that should be permitted the cross examiner when dealing with understandings or agreements as to future prosecutions especially where as here the Government's case depends largely on the testimony of one main witness.

In Giglio v. United States 405 US 150 the Court in a case somewhat similar to the one at bar noted at page 154-155:

> "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

While it is recognized that the trial court has discretion in limiting examination the use of discretion can not be such as to protect a witness from inquiry into a proper area. The Decision in Smith v. Illinois 390 U.S. 129 speaks precisely to this issue at

pages 132-133 wherein the court in quoting from Alford v. United States 282 US 687 restated the law:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable jdugment in determining when the subject is exhausted. ... But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."

In Davis v. Alaska 415 US 308 the court analyzed not only what cross-examination is proper but also the effect upon counsel and the jury where cross-examination is improperly limited. The court restated the existing law when at pages 316-317 the Court stated:

"A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore Evidence Sec. 940, p. 775 (Chadbourn rev 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 US 474, 496 3 L Ed 2d 1377, 79 S Ct 1400 (1959).[4]"

What is of greater interest is the court's analysis of how counsel and the jury are affected. Since cross-examination is the defendant's most effective method of showing prejudice or bias, its denial has been held to be error of constitutional dimensions. The Court

so found at page 318:

> "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v Janis, 384 US 1,3 (16 L Ed 2d 314, 86 S Ct 1245)." Smith v. Illinois, 390 US 129, 131, 19 L Ed 2d 956, 88 S Ct 748 (1968).

In United States v. Campbell 426 F 2d 547, 549-50 the court set forth the test to be applied in determining whether the trial court comitted error in limiting cross examination.

> "In attempting to establish the motives or bias of a witness against him, a defendant may not only elicit evidence showing that the government made explicit promises of leniency in return for cooperation, but may also show conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation.
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> * * *
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> In determining whether the trial jduge has abused his discretion in limiting the introduction of such evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a "discriminating appraisal" of a witness' motives and bias"

Steven Varga did not disclose to the jury sufficient information concerning the events which led to the promises made to him nor the extent of his own criminal conduct which might be covered by the promises. Counsel should have been given greater latitude in

ross-examining in this area. (see: United States v. Leonard 494 F 2d 955; United States v. Hagget 438 F 2d 396; United States v. Wolfson 437 F 2d 862).

Interruption of examination in this area was improper as it tended to prevent the entire scope of the promises made from being layed before the jury for their consideration.

POINT TWO

THE COURT ERRED IN PERMITTING INFLAMATORY AND PREJUDICIAL TESTIMONY

The testimony of John Esposito was received by the court in spite of its overwhelming prejudicial effect, and the court denied defense counsel's motion for a mistrial.

The testimony was offered to circumstantially bolster part of the testimony of Steven Varga. Mr. Esposito testified that he remembered the defendant tonani driving into his place of business and parking his car in an oven-type apparatus used to dry freshly painted cars. Tonani had a gun on his person, and there were two men in the car, one of whom was identified as Philipe. The third man was not identified and only seen for a few seconds. The witness could not establish a definite time reference and did not give testimony connecting this event to the commission of the crimes on trial.

As early as Rumely v. United States 293 F 532 the courts have required that circumstantial evidence must lead from proven fact and inferences that can be drawn to establish a logically compelling fact. The theory has been concisely stated by the Court of Appeals, State of New York in People v. Cleague 22 NY 2d 368 wherein the Court stated:

> "...circumstantial evidence is as nothing unless the inferences to be drawn from the circumstances are logically compelling. The danger, therefore, with the use of circumstantial evidence is that of logical gaps - that is, subjective inferential links based on probabilities of low grade or insufficient degree - which, if undetectd, elevate coincidence and, therefore, suspicion into permissible inference."

The jury received the testimony of John Esposito and was asked to infer that the events he described took place on the date Steven Varga testified to being taken for a ride by Tonani, although

Varga never described an oven-type apparatus or automobile paint shop. Based upon that inference the jury was asked to infer further that the unidentified third man was in fact Varga.

The danger in permitting the testimony is obvious. The improper evidence was to bolster the word of Varga as to the threats and extortionate conduct of the defendants without proving any logically compelling facts upon which the inferences could be drawn, and it required the inference of identity to be based upon an inference as to the date in question. It is beyond cavil that inferences may never be drawn on inferences.

The court should have granted the motion for a mistrial since the evidence was inflamatory and prejudicial, and did not pertain to the Government's direct case. This testimony might have properly come in on the Government's rebuttal if Tonani had testified. Joseph De Simone was charged with the crime but not mentioned by John Esposito.

POINT THREE

THE COURT LACKED JURISDICTION BECAUSE THE SPECIAL ATTORNEY WAS NOT SPECIFICALLY DESIGNATED TO TRY THIS CASE PURSUANT TO 28 U.S.C. 515a

The appellant moved pretrial for an order dismissing the indictment based upon the failure of the Attorney General to specifically designate the Special Attorney who prepared and prosecuted the case. Judge Bramwell after reserving decision, denied the application and this matter proceeded to trial. Since the jury verdict, this court has decided in re: Persico 75-2030 decided June 19, 1975. In his opinion Judge Jack B. Weinstein dealt with the specific question previously raised by this appellant. In that case Mr. Persico had been called before a Federal Grand Jury and questioned the jurisdiction of the Grand Jury in view of the Special Attorney who was conducting the investigation. Judge Weinstein cited cases which have already decided this issue including: United States v. Agruso 75 CR 269 W.D. Mo. decided 2/15/75 (Oliver, J.), United States v. Crispino 75 CR 932 S.D N.Y. decided 2/13/75 (Werker, J.), United States v. Wrigley 74 CR 448 W.D. Mo. decided 2/5/75 (Oliver, J.), United States v. Williams 74 CR 47 W.D. Mo. decided 11/15/75 (Oliver, J.) United States v. Goldman 28 F 2d 424 (D. Conn.), and United States v. Hall 145 F 2d 781, which have held that there is a jurisdictional defect where the Attorney General's designation is not as specific as required by section 515a. In United States v. Morse 292 F 273 the Court required that the designation be as specific as possible and that the designation contain the type of cases to be worked on by the Special Attorney that would be designated.

It is interesting to note that Judge Weinstein in writing his opinion draws upon several areas upon which he ultimately found that the Government need not comply with Section 515a to any great degree.

In his opinion Judge Weinstein talks about organized crime and the statistics which have been compiled at great expense by the Government. He mentions the great cost involved in setting up the intricate methods and bureaucracy which is ultimately under the establishment of field offices and the Task Force. He discussed the degree of control maintained centrally in Washington D.C. from the Strike Force offices and the Special Attorneys who are assigned therein. He refers very often to guidelines which have been established within the bureaucracy to maintain control and discussed at lenfth the great number of studies conducted in which the government found cases against organized crime and the amount of money expended. It is repsectfully submitted to the Court that none of these areas should have been considered by the Court in determining whether or not the government must comply with an existing statute. The logic of Judge Weinstein's opinion appears to be that where a government spends a great deal of money collecting data and organizing offices that there is no need for them to comply with any stattue regardless of its nature.

It is interesting to note that Judge Bramwell did not have before him any guidelines from the Attorney General's office as to how a Special Attorney should proceed. His decision based upon the standard form directs him to work as a Special Attorney. It is similar to the form executed by and on behalf of the Special Attorney in the Persico case. Neither designation mentioned organized crime all that much but Judge Weinstein's opinion details the intricate and intense battles against organized crime.

While it is apparent that the statute calls for specific designation and the intent of Congress was to provide for Special

Attorneys in cases where the United States Attorney's office needed men of particular expertise, it is also clear that in order to comply with the statute the Attorney General should be required to designate some field in which his Special Attorneys will work.

The reasoning of Judge Weinstein showing how closely the Special Attorney and the United States Attorney works is not really significant when the statute is considered. Judge Weinstein apparently was faced with the question of roving commissions and it is specifically held that such commissions would be improper. In our current society it may be impossible to specifically designate a particular officer which will be the subject of any further investigation, but it is certainly reasonable that a Special Attorney be designated to investigate and prosecute organized criminal activities including narcotic transactions, extortionate means of credit transactions, hyjacking and other organized crime type conduct.

The particular form used by the government to appoint Special Attorneys is unlimited in scope and should not be reasonably found to be in compliance with Section 515a. There does not appear to be a cogent reason why the Government of the United States should not comply with the laws of this country. The Government prosecutes persons for violations of United States statutes and prosecutes them even where their part is minimal. The People of the United States have a right to believe that their Governmental Agencies work within the law and do not take actions designed to circumvent the law and create new bodies of Police Agencies.

It is respectfully requested that the Court reaffirm this decision in re: Persico as that decision applies to the case at bar.

CONCLUSION

The sentence below should be vacated, and the indictment dismissed.

Respectfully submitted,

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